No. 3043.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THE AMERICAN STEAMSHIP "COLUSA," her boilers, engines, tackle, apparel and other furniture, and GRACE STEAMSHIP COMPANY (a corporation),

Appellants,

vs.

GEORGE I. DUNWOODY,

Appellee.

BRIEF FOR APPELLEE.

F. R. WALL,
Proctor for Appellee.

Filed this.....day of October, A. D. 1917.
FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

The James H. Barry Co.
San Francisco

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Brief for Appellee.

STATEMENT OF THE CASE.

Appellants' statements of the "Nature of the Appeal and Facts in Brief" are controverted; for the reasons that they do not properly state the questions involved and that the latter is not correct in stating that the appellee was instructed by the mate to set up the deck lashings. The opinion of the trial court contains a cor-

rect statement of the case. We quote therefrom from the Apostles, page 139, *et seq.*, as follows:

> "Libelant was injured while a seaman on board the Steamship 'Colusa,' because of the flying open of a pelican hook on the turnbuckle with which he was lashing a deckload of lumber. The hook was jointed so that it could open and close, and to hold it in place when closed, a ring was slipped down over its top, the ring being on the shank or immovable portion, and when slipped over the top of the movable portion held it fast to the shank and prevented it from opening. Near the point of the movable portion there was a hole through the hook in which, when the ring was in place, a pin should be inserted, the protruding ends of which would keep the ring from slipping off over the end of the hook, and thus insure that the hook would not open when pressure was put upon it by means of the turnbuckle.
>
> "The contrivance was perfectly safe to use so long as the pin was in place, and kept the ring from slipping off. Instead of a split-pin which might be spread so that it would not slip out of the hole when the turnbuckle was turned, a nail was used on the day of the accident which slipped out of the hole when the head of the nail was brought to the lower side in turning the turnbuckle. This released the ring, and it in turn slipped off the hook, the hook opened releasing the lashings, and the recoil of the lashings threw the libelant from the top of the lumber where he was at work turning the turnbuckle. He was thrown through an open hatchway into the hold and sustained serious injuries. The hook was adjusted, the ring put in place, and nail inserted by the boatswain, who was directing the operations, and when all this was done the libelant was directed by him to twist the

turnbuckle so as to tighten the lashings over the lumber.

"From these facts the conclusion seems to me unavoidable that the accident was due to the negligence of the boatswain in placing in the hole a nail which could and did drop out instead of a split-pin which would not, and then directing libelant to tighten the lashing. The boatswain, under the circumstances, was a seaman having command, within the meaning of this provision, of the Act of March 4th, 1915, known as the Seamen's Law:

" 'That in any suit to recover damages for any injury sustained on board a vessel or in its service, seamen having command shall not be held to be fellow servants with those under their authority.'

"The negligence was not wholly that of the boatswain, because he testified that there were no pins provided, and that it was consequently necessary to use nails."

It is, therefore, apparent from the above that the negligence of the boatswain was involved, as well as the negligence relative to the defective appliance.

DALLMAN'S DEPOSITION PROPERLY IN EVIDENCE.

The stipulation under which this deposition was taken reads as follows (Ap., 70-71):

> "The deposition, when written up, may be read in evidence by either party on the trial of the cause; that all questions as to the notice of the time and place of taking the same are waived, . . . and that all objections as to materiality and competence of the testimony are reserved to all parties."

Substantially the same stipulation was entered into as to the deposition of appellants' witness Bergsten (A., 25) and appellee's witness Pfautsch (A., 55).

The Apostles of this court contain hundreds, if not thousands, of depositions similarly taken; and this is, we think, the first time that such an objection has ever been raised. Appellants say (Br., 11), "it could only be read in the event a sufficient showing for its introduction at all was made." In the face of their solemn stipulation that the deposition, *"when written up, may be read in evidence"* and of all of the other circumstances, we say the objection presented and now urged seems nothing less than outrageously reprehensible. The other circumstances appear from the record as follows:

Appellants in December, 1916, knew the address of Dallman and where he was working and knew that he might go to sea (A., 89, 95). The case was not tried until March 16, 1917, yet during all of that time appellants made no effort to take his testimony or to put him under subpoena, although it was appellants' counsel who expressed a desire to have him as a witness in court: "I would like very much to have you as a witness in court" (A., 89). And it was this same counsel who then said: "Now, Mr. Wall, I will arrange, if we want Mr. Dallman's testimony further, if we conclude that there is danger of his not being here, to have him identify one of these turnbuckles—I will arrange to get him down here" (A., 96, 97). No ob-

jection was made to this deposition until the morning the case came on for trial and after the trial was nearly finished. Further, when counsel was told by the court, "I have no desire to shut you off from any defense" (A., 135), counsel made no request for a continuance to have the court hear Dallman or to take Dallman's deposition before the case was decided. The case was submitted March 16, and not decided until May 14th following; yet during all that time no request was made to take his testimony.

In *Howard* v. *Stillwell, etc.,* 139 U. S., 202, the deposition was objected to on the ground, among others, that it "was not taken on the authority of any *dedimus potestatem* granted by any court of the United States according to common usaage." The court there said (p. 205):

> "It is the settled rule of this court that the failure of a party to note objections to depositions, of the kind in question, when they are taken, or to present them by a motion to suppress, or by some other notice before the trial is begun, will be held to be a waiver of the objections. Whilst the law requires due diligence in both parties, it will not permit one of them to be entrapped by the acquiescence of the opposite party in an informality which he springs during the progress of the trial, when it is not possible to retake the deposition." (Citing cases.)

And, in admiralty, as pointed out in Sec. 464 Ben., 4th ed.:

> "Allusion has already been made to the power of the court to vary, interrupt, or postpone proceedings when the cause of justice may require it. So, after the hearing of the case is concluded, on proper cause shown, the court will withhold the conclusion of the cause for the purpose of hearing further proof. This is sometimes . . . ordered on the application of the party. . . when it is necessary to enable him to supply omissions."
>
> "An objection, however, has been made, preliminarily, to this court's noticing the deposition of Adam Lynn; because, as is alleged, it was taken after the cause was set down for hearing, and without any order of the court for that purpose.
>
> "Admitting this to have been irregular, no objection appears to have been made in the court below, to the reading of the deposition; and had it been made, it ought not to have prevailed even there, because the defendants cross-examined the witness, which would be considered a waiver of the irregularity." *Mechanics Bank* v. *Seton,* 1 Pet., 307, 7 L. ed., 156.

So we say that not only the fullest consent to the taking and using of this deposition must be presumed from the manner of its taking; but there is express consent that it may be used upon the trial. The Supreme Court has plainly expressed its view of conduct less reprehensible than that disclosed by the record here. We quote:

> "But it is obvious that all the provisions made in the statute respecting notice to the adverse

party, the oath of the witness, *the reasons for taking the deposition,* and the rank or character of the magistrate authorized to take it, were introduced for the protection of the party against whom the testimony of the witness is intended to be used. It is not to be doubted that he may waive them. A party may waive any provision, either of a contract or of a statute, intended for his benefit. If, therefore, it appears that the plaintiff in error did waive his rights under the Act of Congress—if he did practically consent that the deposition should be taken and returned to the court as it was—and if by his waiver he has misled his antagonist—if he refrained from making objections known to him, at a time when they might have been removed, and until after the possibility of such removal had ceased, he ought not to be permitted to raise the objetcions at all. If he may, he is allowed to avail himself of what is substantially a fraud. Parties to suits at law may assert their rights to the fullest extent; but neither a plaintiff nor a defendant is at liberty to deceive, either actively or passively, his adversary, and a court whose province it is to administer justice, will take care that on the trial of every cause neither party shall reap any advantage from his own fraud.

"In this case it appeared to the court below as the record states, that Underwood was an aged man when his deposition was taken; that he had died before the trial; that one of the counsel for the defendant (now plaintiff in error) had accepted notice of taking the deposition; that he had attended at the taking, and cross-examined the witness; that he made no objection either to the sufficiency of the oath, to the reasons for taking the deposition, or to the competency of the magistrate; and, that, though the deposition had been filed in the record of the cause more than a year before the trial, no exception had been taken to

it in all that time. Under these circumtsances, the consent of the defendant to the manner of taking the deposition must be presumed, or a fraudulent attempt to mislead the plaintiff must be conceded." *Shutte* v. *Thompson,* 82 U. S., 21 L. ed., 125 and 126.

We are, therefore, fully justified by the Supreme Court in all that we have said above.

THE LIABILITY OF THE VESSEL.

Under this head we shall answer all those parts of appellants' brief between pages 12 and 20, inclusive.

The court found, on ample testimony, that—

> "Instead of a split-pin which might be spread so that it would not slip out of the hole when the turnbuckle was turned, a nail was used . . . which slipped out of the hole when the head of the nail was brought to the lower side in turning the turnbuckle. This released the ring, and it in turn slipped off the hook, the hook opened, releasing the lashings, and the recoil of the lashings threw the libelant from the top of the lumber . . . There were no pins provided, and that it was consequently necessary to use nails."

This testimony follows:

APPELLEES' WITNESSES.

DUNWOODY—While they were pulling these chains together with a tackle I was down getting a stillson wrench; when I came back with the stillson wrench they had the two chains pulled together at that time (A. 106).

I stood back until the boatswain finished con-

necting the pelican hook and the other chain together, the port chain; then he told me to go ahead and set it up so I just reached down and got the stillson wrench and started to setting it up. I know who put the nail in there, the boatswain did. Everything was all connected when I started turning on the turnbuckle (A. 109). The next thing I was down in the hold (A. 110). I looked to see whether or not the pin had been inserted in the pelican hook and I saw a nail about 3 inches long, I should say, or 2½ inches. It was smaller than the nail I had seen used all the time. There is no way to fasten it; you just put it in there (A. 115). I did not see that the nail was loose. Some of those holes are larger in some of the pelican hooks. If you bend the nail the ring would slip over the end and the nail too; it would have to be straight to hold the link on there. The nails always staid in before, except a couple of times that I know of they slipped; but that was on a level deck load, there were no accidents or anything (A. 116). I saw the boatswain put the nail in (A. 118).

PFAUTSCH—A nail was put in the hole above the link. I saw the nail in there (A. 58). The nail was loose (A. 59). Dunwoody could not see whether that hole was such that the nail would drop out; that was behind him. He was working on that screw to tighten it up, to get in (it) together, tighten the chain together (A. 64). The nail was not in the hole when I went forward after the accident. It was gone (A. 60). I am not stating that I saw the nail in the pelican hook because a nail was always used. I saw the nail. I actually saw the nail myself (A. 61). After the accident I know the nail was gone. I am able to say right now that there was a nail put in there. I actually saw it myself (A. 62). When I got

there after the accident the nail was gone altogether. I didn't find it (A. 63).

DALLMAN—That is the hole ("N" on libelant's Exhibit 1, Dallman) where the split pin was supposed to be put in there; if we didn't have any we put in a nail (A. 72). I put a nail in there myself (A. 73). There should have been a split pin—there should have been some kind of a pin in there that could not fall out; a pin should come out like this to prevent it from falling out (the witness opens his two index (?) fingers to about an angle of 20 or 30 degrees) (A. 75, 76).

Lots of times that nail would go right in the hole until the head of the nail rested on the pelican hook, and all the strain would be only on one side of the nail, and the strain of that link would bend that nail and it would give way; it happened lots of times before that; it happened every time we put them on, that it slipped. The two trips I was on the ship it happened lots of times, every time we put them on, and got a little too much strain on them, the thing would slip, it would not hold (A. 76). The nail didn't fit; it was too small; we didn't have anything else. The hole was about, I should say 3/8 of an inch: the nail was about 1/4 of an inch (A. 75). There were some pins on board, but not for the turnbuckles (A. 81).

The end of this pelican hook came down toward the stock the way that is indicated by the line AB (on Libelant's Exhibit 1, Dallman). According to my experience with turnbuckles it should have had an upward slant (A. 78). The end where the ring went in (on?) went down instead of up (A. 82). Went down toward the stock of the turnbuckle. I say this: where the ring was slipped over, that the turnbuckle went down. I never saw a turnbuckle that slanted as much as this one did

down (A. 83). We had no split pins for use in that type of hook, because all the other turnbuckles I saw you don't need any nail at all; it would be safe without the nail, because they had an upward slant. I never worked with a turnbuckle with such a downward slant, and I never saw any other; that is the first time I put on a turnbuckle like that; I remember saying, "This ain't going to hold much." It kept on slipping all the time we put them on (A. 94).

Prior to the accident, I had conversation with the first officer of the "Colusa" in regard to her turnbuckles. The mate said that the turnbuckle should not be on the ship, because it was not safe (A. 78). I had a good many (of these conversations with the mate), and I told him about the turnbuckles, we ought not to put them on, they always slipped by themselves. He frequently said it was not fit to be there (A. 79).

There were two different brands (or makes) of turnbuckles on that ship (A. 90, 91).

APPELLANTS' WITNESSES.

CRIBBIN—I know the type of turnbuckle used on the "Colusa" (A. 121). There might have been one or two of the other type; that I would not swear to. My method of securing a turnbuckle is to tie it with a rope marline, or rope yarn, or something of that nature, and we never find any that will slip off (A. 125).

Q. THE COURT—When it does slip off there is something the matter with it then? A. Yes, your Honor, but we never found it to slip off. Q. I know, but I say, if it does slip off, it is because there is something wrong with it? A. Oh, yes (A. 125).

STREMMEL—*Direct.* Q. Do you know the type of turnbuckles used on the "Colusa"? A. Yes, sir, I do. Q. The type of turnbuckle that has a pelican hook that the link slips through and then a pin goes through the end of the hook? A. Well, I am not sure about the pin (A. 126).

Q. Is there more than one type of turnbuckle used on ships? A. Well, there may be; they are not all exactly alike. There may be minor little differences in the construction of a turnbuckle. Q. Do you recall that you used any of this type of turnbuckle that has a hole through the end for the pin that the link slips over so as to hold the link from slipping off? A. I cannot remember whether I ever saw a hole in the end of the pin. Q. The ones you saw, you never remember of seeing that hole used at all; is that the idea? A. No. Q. What holds the link on? A. The strain on the turnbuckle. Q. As I understand you, then, when the turnbuckle (A. 127) is screwed up and the strain comes onto the pelican hook, it, of itself, holds the link on? A. The more strain you get on the chain, on the turnbuckle, the tighter the ring is on. Q. How is the link kept on until you get the strain on the turnbuckle? A. It is slipped on and then the turnbuckle is set up. Q. What is there to prevent its slipping off while you are setting up the turnbuckle? A. Nothing at all (A. 128).

Cross-Examination: I have not paid particular attention to the turnbuckles on the "Colusa" (A. 130).

Re-direct Examination: MR. FORD—You have, though, seen turnbuckles with a hole in the end of the pin, haven't you? A. I don't know; I didn't pay any attention to them. In fact, I know there are turnbuckles that have not got holes.

Q. Most of them have not got holes? A. All the turnbuckles that I have seen, so far as I know, have not got any (A. 132).

From the above testimony the following facts could not be more clearly established:

1. This particular turnbuckle differed from the more common type of turnbuckle in having a hole in the end of the pelican hook;

2. It, also, differed most markedly from other turnbuckles that did have holes in the end of the pelican hooks in that, instead of the end of the pelican hook flaring outward or upward (something like a pig's nose), it curved inward or downward (like a sheep's nose);

3. That in the more usual type of turnbuckle the end of the pelican hook also flared outward or upward; so that the more strain that is put on the turnbuckle, the tighter the link over the pelican hook becomes;

4. Because of the downward curve of this pelican hook, a split pin was absolutely necessary for safety;

5. A nail was used instead, because there were no split pins, a nail that fitted loosely into the hole in the pelican hook;

6. That there could be no recoil or throw to the deck lashings, until after a strain had been brought upon them by setting up on the turnbuckle; and, even

upon appellants' theory, any strain upon the turnbuckle would, with a proper turnbuckle, only result in tightening the link. So, if the link had slipped off before the strain was brought, there would have been no recoil or throw;

7. The nail wasn't put in the end of an outflaring pelican hook of a standard or usual type of turnbuckle for additional security, as appellants suggest. It was put in the hole in the end of a particular pelican hook that curved the wrong way, and something that would not drop out was absolutely required in that hole;

8. It seems like nonsense to say that with a split pin in there the deck lashings could not be slipped in case of danger (App.'s Br. 30). Why couldn't a split pin be removed as easily as a tightly-fitting nail?

9. The nail was put into the hole immediately before the accident, and the turnbuckle was found by Pfautsch immediately after the accident, with the nail gone.

So all of appellants' challenges have been accepted and answered; and then considerably more.

The foregoing facts bring the case within the law making the vessel liable to an indemnity for injuries received by this seaman in consequence of a failure to supply and keep in order a proper appliance appurtenant to the ship (The Osceola, 189 U. S., 175).

THE IN PERSONAM LIABILITY.

The owners are responsible *in personam,* of course, for all the negligence in regard to the failure to supply and keep in order the proper appliance appurtenant to the ship; but, in addition, they are also liable *in personam* for the negligence of the boatswain in placing in the hole a nail which could and did drop out and then directing the libelant to tighten the lashing. The boatswain, in the circumstances, was a seaman having command, within the meaning of Section 20, of the Act of March 4, 1915, known as the Seamen's Act.

We have quoted nothing at all from appellants' witness Bergsten, because the court below, on ample grounds, found against his testimony. The testimony of libelant's witnesses show that Bergsten was not near Dunwoody while the latter was setting up the turnbuckle and had nothing to do with directing him; that Bergsten was on the forecastle head occupied with getting up the anchor:

> PFAUTSCH—The first officer was on the forecastle head heaving anchor (A. 58).
>
> DALLMAN—The first officer was taking up the anchor, was on the forecastle head (A. 72). The first thing I saw, I heard the man (the mate) holler, "Go and get this man up," and the mate was standing on the after-part of the forecastle-head (A. 92).

DUNWOODY—While I was working with the stillson wrench nobody was with me there; I was there myself. The first mate was just coming off the forecastle head, he was in the eyes of the ship when I first stooped down to pick up the stillson wrench, and I raised up and I looked forward, and the first mate was just starting to walk aft. There was nobody there but myself when I started turning up this turnbuckle (A. 116, 117).

THE BOATSWAIN GAVE LIBELANT THE ORDER TO SET UP THE LASHING AND DUNWOODY HAD TO OBEY.

PFAUTSCH—The boatswain was in charge of the men in that group, of this work that we done, and he gave the orders to tighten up the deck lashings, to set up the deck lashings and tighten them up (A. 59).

DALLMAN—I was with Dunwoody at the time that the turnbuckle was put in place, I was in charge of the work. I was in charge of putting the lashing on. All of the sailors in the group or gang that were working there were under my authority. . . . I told Dunwoody to tighten up the turnbuckle and I went to the next lashing to put the tackles on there (A. 71, 72). I tell the men; they have to obey orders (A. 77). I was in charge of these men (A. 86).

THE BOATSWAIN WAS A SEAMAN IN COMMAND.

Dunwoody was under the boatswain's authority and had to obey his commands. That is the test imposed by the law. The vessel was getting under way or had just got under way in a foreign port, and dis-

obedience of this command would have meant prompt punishment for Dunwoody.

We have seen, as a matter of fact, that the mate did not have charge or command of this particular work, that he was occupied forward getting up the anchor.

In the matter of *Tonawanda Iron & Steel Co.* 234 Fed., 198, the accident happened Nov. 2, 1913 (p. 199), and the only question really involved was, Is the Seamen's Act (March 4, 1915) retroactive? The court there said (p. 201):

> "(4) The maritime law at the time of the accident was in its application essentially different from the common and statutory law dealing with injuries to servants arising from the negligence of the master or fellow servants, and the adjudications already cited herein point out such differences with clearness and understanding. But it is contended that section 20 of the Seamen's Act, so called, passed by Congress on March 4, 1915 (38 Stat. 1185, c. 153), radically changed the existing maritime law as to the liability of the ship to seamen, in that it abolished the fellow servant doctrine by expressly providing:
>
> " 'That in any suit to recover damages for any injury sustained on board vessel or in its service seamen having command shall not be held to be fellow servants with those under their authority.'
>
> "Was such act retroactive?"

The court held that it was not.

Also, it is stated by the court (p. 199) that the injured seaman testified "that he was ordered to take

in the slack of the line and trice it along the rail"; and that while obeying that order, he was injured. No question was raised as to the grade of the seaman giving the order. Also, "There was no evidence to support the view that the vessel was unseaworthy" (p. 200).

It is true that the Act does make the owners answerable for the negligence of the officers charged with the responsibility of the ship's navigation. It is equally true that the Act also makes the owners responsible for the negligence of any other seamen causing injury to a seaman under their authority and whose commands the injured seaman must obey.

The boatswain has always been an officer; and his acts, like the acts of any other member of the crew in doing ship's work, are acts in connection with the navigation of the vessel. The quartermaster on board the vessel is not a licensed officer. In grade he stands below the boatswain. But the quartermaster is, in a very special sense, usually charged with responsibility of the vessel's navigation. The same is true of the lookout. And certainly the boatswain, in securing the deckload for sea, is engaged in making the vessel seaworthy, and also, in a very special sense, responsible for the navigation of the vessel. But Section 20 of the Act was plainly intended to cover all cases where the injuries were caused by the negligence of a seaman whose orders the injured seaman had to obey because the injured seaman was under the authority

of the negligent seaman and had to obey the seaman entitled to give him the command. That such is the plainly expressed intention of the section appellants themselves would have made only too clear if they had quoted the opening part of Section 4,612, U. S. R. S., which they should have done, instead of only a part of it; also, they should not have omitted the quotation marks from the word "seaman" in the part they did quote. The pertinent part of the section reads as follows:

> "Sec. 4612. In the construction of this Title, every person having the command of any vessel belonging to any citizen of the United States shall be deemed to be the 'master' thereof; and every person (apprentices excepted) who shall be employed or engaged to serve in any capacity on board the same shall be deemed and taken to be a 'seaman' ";

The captain is a master seaman having command of the vessel and of every member of her crew; yet he is never particularly referred to, either in the language of the law or the language of the sea, as a "seaman" or as a "seaman having command": he is always the "Captain," or the "Master" or "A Master Mariner." By the law, all of the officers, except the master, and all other persons on board having command over those placed under their authority are designated as "seamen," just as the others who have no authority are seamen; and Section 4612, at the time Section 20 was enacted, so designated all of them, as

it designates them to-day. Also, Section 20 speaks of "seamen having command" of "those under their authority": that is, in the plural, of each person who is designated by the law as a "seaman."

Section 20, as a part of the Seamen's Act, became a part of that Title under the Revised Statutes of the United States dealing with "Seamen"; also, in the Seamen's Act, wherever the master alone is meant he is dealt with under the designation of "master" (U. S. R. S., Secs. 4516, 4529, 4530); that in dealing with licensed officers of vessels, the Revised Statutes deals with them under a separate head; that the use of the word "seamen" in the plural in Section 20 absolutely forces a construction that the word was meant to include "every person (apprentices excepted) who shall be employed or engaged to serve in any capacity on board" of any vessel.

Prior to the enactment of Section 20, the question as to who were fellow servants in seamen's personal injury cases against the shipowner almost always, if not always, arose out of "matters connected with the navigation of the ship" (*The Troop,* 128 Fed., 858), or "in respect of the navigation and management of the vessel" (*The Osceola,* 189 U. S. 160). For example, in *The Osceola,* the accident was caused by the wind blowing down a derrick that was being used to hoist a gangway in place "in order that the vessel might be ready to discharge cargo immediately upon arrival at her dock" (189 U. S., 159). The alleged

negligence was the giving of the order by the Master that the derrick should be used and the gangway hoisted while the vessel was underway. So, in a true sense, we may say that all ship's work done by the crew (whether running the engines, securing the deck-load or cooking for the crew) is "connected with the navigation of the ship"; but in doing such work, the persons doing it, usually are not "charged with the responsibilities of her (the ship's) navigation" in the limited sense of steering or directing her course; and the old rule was never considered from any such point of view. In fact, the language in The Osceola is express "that all members of the crew . . . are, as between themselves, fellow servants." On that basis alone, one wonders where the view expressed by appellants could have had its origin; but one is much more curious to know, in view of Section 4612, U. S. R. S., and the rule that Section 20 of the Act modified, by what canon of construction appellants justify the interpolation into Section 20 of the words "negligence of the officers charged with the responsibilities of her navigation."

Appellants seem to attach some importance to the fact that the boatswain took charge of the deck work as directed by the mate. But what difference can it make if the mate did give him orders? The master gives orders to the mate and to everybody else on board. The mate gives orders to the second mate and to everybody else on board, except the master; the

second mate gives orders to every one on board, except the mate and the master; and the boatswain gives orders to every one on board in the deck force below him. This was well known 300 years ago, as appears in the opening of The Tempest, where Shakespeare says, "Boatswain have care, speak to the mariners"; and that same boatswain might well have told the Illyrians on board, "I tell the men; they have to obey orders."

As we have seen, it does not matter whether or not the boatswain was an officer or whether or not he was charged with the responsibility of the navigation of the vessel; but we say that, most decidedly, he was an officer and, in securing the deckload for sea, was charged with responsibility for the navigation of the vessel.

In *"Jacobsen's Sea Laws,"* a most ancient and eminent authority, it is said at page 123:

> "The next officer to the mate on board, is the *boatswain.* He has the care of the *tackle* of the vessel," etc.

And that he is a seaman having command has been recognized by the Admiralty Court. We take the following extract from the case of *The Miami,* 87 Fed. 760:

> "The boatswain had immediate charge of the work and the three sailors detailed to do it, and, in connection with such charge, was lending manual aid. The mate was superintending the work from *a somewhat higher post of command."*

Appellants seem to lay some stress on the fact that a boatswain is not a *licensed* officer; but licensed officers are comparatively new to the maritime law. For thousands of years ships were run by those who were not licensed officers; and to-day licenses are not even required in our own country for the master or any other officer on board of a sailing vessel of less than 700 tons gross and not carrying passengers; nor is a license required for any officer, except the master, on sailing vessels of more than 700 gross tons and not carrying passengers (U. S. R. S., 4438).

There is another aspect of this part of the case that we wish to present to the court. It appears in the numerous decisions construing similar state statutes. Of such a law of Pennsylvania, the C. C. A., 3rd Cir., said, in *Flickwir & Bush, Inc.,* v. *Walkonen,* 238 Fed., 309:

> "It sufficiently appears that the proofs tended to show that . . . his (the injured man's) duty was to conform to the orders of Oudine, the carpenter boss; that he was ordered by Oudine to stand on a certain brace in doing a certain piece of work; that he conformed to such orders, and by reason of said brace being unsupported by a cleat or tie rod it gave way and caused plaintiff's injuries; that the injury was caused by Oudine's negligence, whose duty it was to see the brace was secured; and that the proof that the brace was not supported at all, a lack which was patent on inspection, all united to bring the case within the Pennsylvania statute quoted, and afforded grounds from which the jury

could infer negligence on the part of the defendant."

This would certainly seem to cover the whole of libelant's case.

New York has a statute providing that the employer shall be liable for injuries caused "by reason of the "negligence of any person in the service of the em- "ployer entrusted with and exercising superintendence "whose sole or principal duty is that of superintend- "ence" (Labor Law, Sec. 200).

It is submitted that the meaning of that statute, like the one in Pennsylvania, is substantially the same as the one concerned in this case, "in command" being more of a maritime term and corresponding to the land expression "exercising superintendence."

That statute has been many times construed. In *Proctor & Gamble Co.* v. *Williams,* 106 C. C. A. 45, it was held (following the construction placed upon it by the state courts) that the purpose of the statute was to secure proper superintendence for all workmen; that it was not necessary that a person be formally authorized by the employer to be such a superintendent, but that the statute should be liberally construed to include all persons in the employ of the master having duties as foremen, superintendents and the like.

And in *Guilmartin* v. *Solway Process Co.,* 189 N. Y. 490, it was held that if the order which caused the injury was even a mere detail of the superintendent's work, the employer would be liable.

In *McHugh* v. *Manhattan R. Co.,* 179 N. Y. 378, it was held that a train dispatcher acts as a superintendent in sending out a train.

In *Cashmore* v. *Peerless Motor Car Co.,* 154 N. Y., App. Dis., 814, it was held that an employer is liable for the acts of a servant entrusted with authority to direct, control or command another employee in the discharge of his duty, no matter how limited that authority might be.

In *Markin* v. *Burke,* 212 Fed. 148, it was held that the negligence of a blasting foreman rendered the master liable.

The decisions of the State courts are pointed because, and only because, of the enactment of Section 20.

In respect of the facts here presented, this case is the same as that of *Quebec S. S. Co.* v. *Merchant,* 133 U. S. 375, except that in the last-mentioned case the action was at law and the injury was caused by the negligence of a fellow servant. In the *Quebec* case, the Supreme Court pointed out the well-known exception to the fellow-servant rule that the employer is liable "when the other servant occupies such a "relation to the injured party, or to his employment, "in the course of which his injury was received, as "to make the negligence of such servant the negli- "gence of the employer." This court, in *Olson* v. *Navigation Co.,* 104 Fed. 576, while stating that the Olson case was to be determined by the rules of the

maritime law, said that in such a case *in personam* in the admiralty, the rule as to liability is the same as that announced in the *Quebec* case, and said further:

> "Assuming, therefore, that the mere leaving open of the hatch, under the circumstances stated, can be properly held to have been negligence, it must necessarily have been the negligence of some officer or member of the crew of the ship. Assuming, further (for it is not so alleged) that it was the negligence of the captain, it was no more than negligence in the ordinary navigation of the ship, in which common employment all of the members of the ship's company were engaged. . . . 'The true inquiry,' said Judge Wallace, 'is whether the character of the act of the captain was one which it was incumbent upon the defendant (the owners) to see properly performed.' . . . 'The navigation of a ship from one port to another constitutes,' as said by Judge Brown in the *City of Alexandria* (D. C.), 17 Fed. 390, 'one common undertaking or employment, for which all of the ship's company, in their several stations are alike employed. Each is in some way essential to the other in the furtherance of the common object, viz: the prosecution of the voyage.'" *Olson* v. *Or. Coal & Nav. Co.,* 104 Fed. 575 and 576.

Now, the whole point here is that Section 20 has placed the seamen-in-authority in the same category with "vice principals," under that branch of law permitting recovery for the negligence of vice principals. This is made certain by what Justice Gray said in the case of the *A. Heaton,* 43 Fed. 595 and 596, which

opinion was rendered at a time before the "vice principal" rule had been disposed of in Federal Courts by the Supreme Court's ruling in the case of *Railroad Co.* v. *Conroy,* 175 U. S. 323. Justice Gray, in the *Heaton, supra,* said:

> "No reason can be assigned why the owners of a vessel should be held less liable to a seaman for the negligence of the master in a court of admiralty than in a court of common law."

This court found Justice Gray's reasoning not applicable in the Olson case, because the captain had been, by the Conroy case, put in the "fellow servant" category in all that related to the navigation of the ship. And just there is the vital point: The negligence of the seaman-in-authority, when commanding another seaman, is the negligence of the employer, because the negligent seaman occupies such a relation to the injured party and to his employment as to make the negligence of such servant the negligence of the employer.

LIBELANT DID NOT ASSUME THE RISK.

The cases cited by appellants, under this head, have no application whatsoever to the facts here.

As to the cause of libel *in rem,* it is thoroughly well established by the Supreme Court in *The Osceola,* 189 U. S. 175, that the libelant is, of course, not entitled to an indemnity, unless the injuries were "in " consequence of the unseaworthiness of the ship, or

" a failure to supply and keep in order the proper ap- " pliances appurtenant to the ship" (*The Fullerton,* 167 Fed. 11). The trial court found, on uncontradicted testimony, that one of the causes of the injuries was a failure of the ship to supply and keep in order a proper appliance appurtenant to the ship. This court declared, in the case of *The Fullerton,* 167 Fed. 10 and 11, that in such a case as this the question of the assumption of risk did not enter; and summed the matter up thus, quoting with approval the language of the court below (p. 11):

> "If the ship could not make proper preparations for sea, and chose to go to sea without them, it was a deliberate assumption by her of all risks and all damages which might result from such want of preparation, which would include all damages that the crew might suffer in the way of injury through such want of preparation."

The cause of libel *in personam* includes the negligence alleged in the *in rem* cause, and counts, in addition, on the negligence of the boatswain. Of course, if the negligence *in rem* was proved, and we hold it unquestionably was, as the testimony was not even contradicted, then the negligence of the boatswain would not matter, either under the maritime law as it was before Section 20 was enacted, or under that law after its enactment; and this for the reason that if the employer was negligent, he is not released from liability if the negligence of a fellow servant also contributed to causing the injuries.

It is, therefore, only in the case that the negligence of the boatswain was the sole cause of the injury in this case, that Section 20 would come into play. The trial court found he was not the sole cause; and most assuredly he was not. But suppose, for argument's sake, he had been. Under that supposition, it is equally clear that the libelant would not have assumed the risk; for, in the name of common sense, what would be the good of giving with one hand to the seaman the right to recover for the negligence of one whose orders the seaman must obey and with the other taking that right away by saying that although he has to obey the order, he can't recover because he assumes the risk? That such risk is not assumed is apparent from the decisions on similar state statutes, *supra;* but, even in the admiralty before the enactment of Section 20, probably no case can be found where it is held that a seaman assumed the risk when he had to obey orders and *where he otherwise had a right of action.* For it must always be remembered that, prior to the enactment of Section 20, the seaman's right to recover an indemnity under the maritime law was limited to the case specified in *The Osceola, supra.*

Upon this question of the assumption of risk by the seaman, prior to the enactment of Section 20, we call the attention of the court to the following:

> "A seaman on board ship has not the privilege of using his own judgment, or of quitting the ship's service if he apprehends danger, like an

ordinary workman on shore. If owners cannot be held as insurers of the appliances furnished to the ship for the safety of seamen, they ought, at least to be held to the strictest rule of diligence and care." *The Edith Godden,* 23 Fed. 44.

"It may be, as urged so strongly by the appellant, that the libelant received these appliances and proceeded to use them without objection, but, if this be so, it must be considered that on board ships a sailor is not expected to, nor, as for that matter, permitted, before executing an order, to question, the propriety of the order or the sufficiency of the materials furnished." *Wm. Johnson & Co.* v. *Johansen,* 86 Fed. Rep. 889.

"It is well settled that no such voluntary quality can be ascribed to their conduct in continuing to expose themselves to abnormal risks which come to their knowledge while their contract is being carried out. The rationale of this exception to the general rule is that they are bound by their shipping articles to strict obedience, that they are subject to severe penalties if they refuse to perform their duties, and that they have not the option, which landsmen are theoretically supposed to possess, of abandoning their employment the moment they are exposed to an abnormal risk." *Labbatt on Master and Servant,* Vol. 3, Sec. 1201.

"The seaman on the voyage has no alternative but to obey or suffer punishment. He cannot dissent from or abandon the service on account of the dangers or unreasonableness of the particular service required, as he might do in port, but must obey at any risk or hazard to himself; and yet he voluntarily incurs no risk, but acts upon the risk and responsibility of those whose lawful authority

demands of him implicit obedience to every lawful command, however unreasonable or dangerous, to which he reluctantly submits to his own personal injury." *Thompson* v. *Herman,* 47 Wis., 608.

FAILURE TO PRODUCE TURNBUCKLE.

We thoroughly agree with appellants as to the importance of the turnbuckle in this case; but appellants do not pretend to make any real showing why the turnbuckle was not produced on the trial of the cause below. Appellants say (Br. 6), "At the time of the trial of this cause the 'Colusa' was at sea"; but they do not point out that she was in the port of San Francisco from Feb. 5 to Feb. 20, 1917 (the case was tried March 16, 1917), nor that she was in the same port in January, 1917. Their brief further says (p. 6), "Upon her next landing at this harbor "a turnbuckle . . . was removed from the vessel, "and an effort was made to submit it for the inspec- "tion of this court by way of additional proof. This "application was denied, without prejudice to its re- "newal at the time of the hearing." If by "her next landing" is meant the next landing after the trial of the cause, we call the attention of the court to the fact that such next landing was on April 25 and while the cause was still under submission and undecided in the court below. If by "her next landing" is meant the landing during the latter part of September referred to in the affidavit of Mr. Ford in connection with the motion, then we want to point out that she

arrived here on Sept. 28, 1917, and this court met on Oct. 1, 1917, and that the motion was not renewed on Oct. 1st, nor has it ever been renewed, and there is now no motion to take additional proof before this court; and that it would be entirely unprecedented for such a motion to be made at the hearing or just before the hearing. Nor is it the fact that the denial of this motion was accompanied with permission to renew the motion "at the time of the hearing"; the denial was accompanied with permission to renew the motion, and the renewal should have been promptly made upon the coming in of this court, and appellants should not be permitted to attempt to "muss up" this case at this time of day.

But what we have already said is only the least part of appellants' offending in regard to this turnbuckle; and we turn now to the greater part.

It appears by the affidavit on file on behalf of the appellee, in answer to Mr. Ford's affidavit, that the "Colusa" was in Puget Sound during the latter part of December, 1916, and in San Francisco during 1917, as follows:

January 6-8; February 5-20; April 25 to May 4; July 13-21; September 28 to October 8.

That affidavit also shows that at the time the deposition of the mate was taken in December, 1916, Mr. Palmer, the proctor who took his testimony for appellant, showed affiant drawings of the turnbuckle and told affiant that he (Mr. Palmer) had made the

drawings from the turnbuckle. And on the trial of the cause, counsel for appellants stated to the court, "Mr. Palmer has a picture of it (the turnbuckle) that he drew" (A. 108).

Further than this, the record shows that when Dallman's deposition was taken December 29, 1916, about a week before the "Colusa" arrived in San Francisco, proctor for libelant made the following request:

> "MR. WALL—Request is also made to produce the turnbuckle *before the trial* for identification. At this time I want the record to show that I request that Mr. Ford *produce it at the trial*" (A. 97).

Just before that, Mr. Ford had stated:

> "Now, Mr. Wall, I will arrange, if we want Mr. Dallman's testimony further, if we conclude that there is danger of his not being here, to have him identify one of these turnbuckles—I will arrange to get him down here" (A. 96, 97).

Not a thing was done from December to the time of the trial of the case in March to produce the turnbuckle for any purpose. It was not produced at the trial in the court below, *nor was a particle of testimony taken to account for its non-production;* nor was its non-production accounted for in any way; nor was any effort made between the submission of the case on March 16th and its decision on May 14th following to account for the absence of the turnbuckle or to take any testimony in regard to it.

The note to Rule 7 of this court provides:

> "Appearances cannot be entered unless counsel is a member of the bar of this court, . . . Briefs signed by counsel who are not members of the bar of this court or fully qualified under the provisions of this rule will not be considered by the court."

Appellants' brief is signed with a firm name, a most eminent firm name; but we most respectfully submit that, under the well-recognized ruling, the firm is not a member of the bar of this court or qualified under the provisions of the rule. So that, in reality, there is no appearance here for appellants. And that is not surprising. It is easy to understand how any individual would, if we may be allowed to fall into the language of the street, desire to "pass the buck" in regard to the responsibility for the failure to produce this turnbuckle at the trial. Naturally such person would want to intrench himself behind the parapet of such a good, long firm name.

This court does not entertain motions, even when regularly made, to take additional proof, unless it is made to appear clearly that such testimony could not have been taken below. As this court says, "The practice of bolstering up a lost cause by additional testimony ought not to be encouraged" (117 Fed. 70). Here it appears clearly that the testimony could and should have been taken below; and appellants' attempt to bring the matter forward at this time seems only

a pretense to save them from the legal consequences of not having produced the turnbuckle at the trial, without the least showing why it was not produced then. Those consequences they must abide by. They are thus stated in the books:

> "Is it not fair to presume that the claimant had knowledge of the real cause of the leak, and that its failure to show what the cause was is a strong circumstance tending to show that, if the truth had been disclosed, it would not have relieved the claimant upon any of the grounds of exemption from liability in the shipping receipts or bills of lading?
>
> "In *Railway Co.* v. *Ellis,* 4 C. C. A. 454, 54 Fed. 481, 483, the court said:
>
> " 'Now, it is a well-settled rule of evidence that when the circumstances in proof tend to fix a liability on a party who has it in his power to offer evidence of all the facts as they existed, and rebut the inferences which the circumstances in proof tend to establish, and he fails to offer such proof, the natural conclusion is that the proof, if produced, instead of rebutting, would support, the inferences against him; and the jury is justified in acting upon that conclusion. "It is certainly a maxim," said Lord Mansfield, "that all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other side to have contradicted." *Blatch* v. *Archer,* Cowp. 63, 65. It is said by Mr. Starkie, in his work on *Evidence* (volume I, p. 54): "The conduct of the party in omitting to produce that evidence in elucidation of the subject-matter in dispute which is within his power, and which rests peculiarly within his own knowledge, frequently affords occasion for

presumptions against him, since it raises strong suspicion that such evidence, if adduced, would operate to his prejudice.'" *Pacific Coast S. S. Co.* v. *Bancroft-Whitney Co.,* 94 Fed., pp. 198 and 199, C. C. A., 9th Cir.

"The production of weaker evidence, when stronger might have been produced, lays the producer open to suspicion that the stronger evidence would have been to his prejudice." *Runkle* v. *Burnham,* 153 U. S. 216, syllabus.

"The rule even in criminal cases is that if a party has it peculiarly within his power to produce witnesses whose testimony would elucidate the transaction, the fact that he does not do it creates the presumption that the testimony, if produced, would be unfavorable." *Graves* v. *United States,* 150 U. S. 118, syllabus.

"The failure of a party to produce testimony within his knowledge and power on a material question involved in the case raises a presumption that the fact is against him." *Choctaw & M. R. Co.* v. *Newton,* 140 Fed. 225, syllabus.

"Where evidence is open to two interpretations, and it is within the exclusive power of one party to show what the truth is, the failure of such party to produce the evidence will authorize the jury to presume that, if produced, it would be unfavorable to him." *Robinson* v. *Union Cent. Life Ins. Co.,* 144 Fed. 1005, syllabus.

"If a party to a cause fails to produce evidence which in the opinion of the jury he could produce in support of his position if his testimony, which is contradicted, is true, the jury is justified in

drawing the inference from such omission, either that there is no such evidence that can be produced, or that if it was produced it would not be favorable to such party." *Murray* v. *Joseph,* 146 Fed. 260, syllabus.

"The failure of the claimants to call these two young men, and the explanation sought to account for this failure, are unsatisfactory, and do not dispel the presumption raised against the claimants, that the testimony of these witnesses, if produced, would have been unfavorable. This is a well-settled rule of evidence, not only in civil, but also in criminal, cases. As was well said by Lord Mansfield in *Blatch* v. *Archer,* Cowp. 63, 65:

" 'It is certainly a maxim that all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other side to have contradicted.'

"Mr. Starkie, in his work on *Evidence* (volume I, p. 54), thus lays down the rule:

" 'The conduct of the party in omitting to produce that evidence in elucidation of the subject-matter in dispute which is within his power, and which rests peculiarly within his own knowledge, frequently affords occasion for presumptions against him, since it raises strong suspicion that such evidence, if adduced, would operate to his prejudice.'

"See also, *Com.* v. *Webster,* 5 Cush. 295, 316; *People* v. *McWhorter,* 4 Barb. 438; *Railway Co.* v. *Ellis,* 10 U. S. App. 640, 4 C. C. A. 454, and 54 Fed. 481.

"In the last case it was held that the failure to produce an engineer as a witness to rebut the inferences raised by the circumstantial evidence would justify the jury in assuming that his evi-

dence, instead of rebutting such inferences, would support them." *The Joseph B. Thomas,* 81 Fed. p. 583.

If the particular turnbuckle had been produced, the end of the pelican hook would have curved downward and the hole in the end of the pelican hook would have been considerably larger in diameter than the diameter of a three penny nail.

It is respectfully submitted that the decree should be affirmed.

Proctor for Appellee.